

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

IN THE MATTER OF:  
Cedar Chemical SUPERFUND SITE  
West Helena, Phillips County, Arkansas

ADMINISTRATIVE ORDER ON  
CONSENT FOR REMEDIAL  
INVESTIGATION/FEASIBILITY STUDY

See Appendix A for List of Respondents,  
  
Respondents

U.S. EPA Region 6  
CERCLA Docket No. \_\_\_\_\_

Proceeding Under Sections 104, 107 and  
122 of the Comprehensive Environmental  
Response, Compensation, and Liability Act,  
as amended, 42 U.S.C. §§ 9604, 9607 and  
9622.

ADMINISTRATIVE ORDER ON CONSENT  
FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY

**I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Order on Consent ( "Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and the Respondents listed in Appendix A, incorporated by reference herein ("Respondents"). The Order concerns the preparation and performance of a remedial investigation and feasibility study ("RI/FS") at the U.S. Oil Recovery Superfund Site ("Site"), located at 49 Phillips Road, West Helena, Phillips County, Arkansas and the reimbursement for future response costs incurred by EPA in connection with the RI/FS.

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9607 and 9622 ("CERCLA"). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (Jan. 29, 1987), and further delegated to Regional Administrators on May 11, 1994, by EPA Delegation Nos. 14-14-C and 14-14-D. This authority was further redelegated by the Regional Administrator of EPA Region 6 to the Superfund Division Director by (insert the numerical designations and dates of regional delegation).

3. In accordance with Sections 104(b)(2) and 122(j)(1) of CERCLA, 42 U.S.C. §§ 9604(b)(2) and 9622(j)(1), EPA notified the Federal and State natural resource trustees on \_\_\_\_\_, 2012, of negotiations with potentially responsible parties regarding the release of

hazardous substances that may have resulted in injury to the natural resources under Federal and State trusteeship.

4. EPA and Respondents recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Order do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of fact, conclusions of law and determinations in Sections V and VI of this Order. Respondents agree to comply with and be bound by the terms of this Order and further agree that they will not contest the basis or validity of this Order or its terms.

## **II. PARTIES BOUND**

5. This Order applies to and is binding upon EPA and upon Respondents and their heirs, successors and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this Order.

6. Respondents are jointly and severally liable for carrying out all activities required by this Order. In the event of the insolvency or other failure of any one or more Respondents to implement the requirements of this Order, the remaining Respondents shall complete all such requirements.

7. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondents shall be responsible for any noncompliance with this Order.

8. Each undersigned representative of Respondents certifies that he or she is fully authorized to enter into the terms and conditions of this Order and to execute and legally bind Respondents to this Order.

## **III. STATEMENT OF PURPOSE**

9. In entering into this Order, the objectives of EPA and Respondents are: (a) to determine the nature and extent of contamination and any threat to the public health, welfare, or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants at or from the Site, by conducting a Remedial Investigation as more specifically set forth in the Statement of Work ("SOW") attached as Appendix B to this Order; (b) to identify and evaluate remedial alternatives to prevent, mitigate or otherwise respond to or remedy any release or threatened release of hazardous substances, pollutants, or contaminants at or from the Site, by conducting a Feasibility Study as more specifically set forth in the SOW in Appendix B to this Order; and (c) to recover response and oversight costs incurred by EPA with respect to this Order.

10. The Work conducted under this Order is subject to approval by EPA and shall

provide all appropriate and necessary information to assess Site conditions and evaluate alternatives to the extent necessary to select a remedy that will be consistent with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 (“NCP”). Respondents shall conduct all Work under this Order in compliance with CERCLA, the NCP, and all applicable EPA guidances, policies, and procedures.

#### **IV. DEFINITIONS**

11. Unless otherwise expressly provided herein, terms used in this Order that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

b. “Day” shall mean a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

c. “Effective Date” shall be the effective date of this Order as provided in Section XXIX.

d. “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

e. “Texas Commission on Environmental Quality” shall mean the State pollution control agency and any successor departments or agencies of the State.

f. “Engineering Controls” shall mean constructed containment barriers or systems that control one or more of the following: downward migration, infiltration or seepage of surface runoff or rain; or natural leaching migration of contaminants through the subsurface over time. Examples include caps, engineered bottom barriers, immobilization processes, and vertical barriers.

g. “Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, Agency for Toxic Substances and Disease Registry (“ATSDR”) costs, the costs incurred pursuant to Paragraph 54 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph 40 (emergency response), and Paragraph 84 (Work takeover”).

h. “Institutional controls” shall mean non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land and/or resource use. Examples of institutional controls include easements and covenants, zoning restrictions, special building permit requirements, and well drilling prohibitions.

i. “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

j. “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

k. “Order” shall mean this Administrative Order on Consent, the SOW, all appendices attached hereto (listed in Section XXVII) and all documents incorporated by reference into this document including without limitation EPA-approved submissions. EPA-approved submissions (other than progress reports) are incorporated into and become a part of the Order upon approval by EPA. In the event of conflict between this Order and any appendix or other incorporated documents, this Order shall control.

l. “Paragraph” shall mean a portion of this Order identified by an Arabic numeral.

m. “Parties” shall mean EPA and Respondents.

n. “RCRA” shall mean the Resource Conservation and Recovery Act, also known as the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.*

o. “Respondents” shall mean those Parties identified in Appendix A.

p. “Section” shall mean a portion of this Order identified by a Roman numeral.

q. “Site” shall mean the Cedar Chemical Corporation Superfund Site, encompassing approximately 48 acres, located at 49 Phillips Road, West Helena, Phillips County, Arkansas and depicted generally on the map attached as Appendix C.

r. “State” shall mean the State of Arkansas.

s. “Statement of Work” or “SOW” shall mean the Statement of Work for development of a RI/FS for the Site, as set forth in Appendix B to this Order. The Statement of Work is incorporated into this Order and is an enforceable part of this Order as are any modifications made thereto in accordance with this Order.

t. “Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

u. “Work” shall mean all activities Respondents are required to perform under this Order, except those required by Section XIV (Retention of Records).

## **V. FINDINGS OF FACT**

12. The US Oil Recovery (“USOR”) and MCC Recycling (“MCC”) properties are respectively located at 400 North Richey Street and 200 North Richey Street in Pasadena, Harris County, Texas 77506. The USOR property includes 225 (25 cubic yard) roll-off containers, approximately 797 (55 gallon) drums, approximately 212 (300 to 400 gallon) totes, approximately 24 (1,000 to 30,000 gallon) above ground storage tanks (ASTs) in varying degrees of operation located outside on the north end of the facility with secondary containments, an approximate 300,000 gallon capacity dual cell bioreactor in poor condition located on the northwest side of the property with an unknown amount of material (liquids, sludges, and solids) and structural damage (reportedly from March-April 2009), 2 (20,000 gallon) frac tanks in good condition, a large full retention pond on the west side of the property, and a parking lot that would often contain standing water between the office and the warehouse during heavy rain events. The MCC property includes 2 clarifiers, 2 oxygen digesters, an oxygen activation sludge unit, an oxygen plant, a chlorination building, a lift station (1), a gravity thickener, an aerobic digester, a belt filter press building, a pump control room, a chlorine contact tank (basin/concrete containment area), a high rate trickling filter, an oil-water separator, a primary clarifier, a final clarifier, and lift stations (2). USOR and/or MCC received municipal and industrial Class I and Class II wastewater, characteristically hazardous waste, used oil and oily sludges, and municipal solid waste. The operator of the Site property had ceased operations in June of 2010, prior to the state-court appointed Receivership in July of 2010.

13. On July 1, 2010, the Texas Commission on Environmental Quality (“TCEQ”) and Harris County Public Health and Environmental Services (“HCPHES”) contacted the National Response Center (“NRC”) and the EPA hotlines requesting assistance in stabilizing the Site and managing a large volume of hazardous substances and waste in preparation for a significant weather season, based on the historical Site knowledge and the near proximity to Vince Bayou which flows directly into the Houston Ship Channel. As a result, the EPA performed three emergency response actions to stabilize the Site and prevent further releases of hazardous substances and waste into nearby Vince Bayou. The first was in July 2010, the second in November 2010, and the third in January, 2011. EPA and its contractors performed preliminary assessments of the Site property on July 2, 2010 and again on November 9, 2010 and January 25, 2011. The preliminary assessments identified and observed the historic and on-going release of hazardous substances from the Site property into Vince Bayou through stormwater and precipitation runoff.

14. During the EPA emergency response efforts and preliminary assessments, the following hazardous substances were detected: a) acetone was detected at 1,390 and 14,000 µg/L in samples collected from two uncontrolled releases at the MCC property which were draining directly into Vince Bayou and in the water

sample collected from the top 12 inches of water in the Retention Pond located on the USOR property; b) benzene was detected at 18.9 and 46.4 µg/L in samples collected from two uncontrolled releases at the MCC property which were draining directly into Vince Bayou and also detected at 3.75 mg/L in a sludge sample collected from the north tank farm at the USOR property; c) ethyl benzene was detected at 57.5 and 757 µg/L in samples collected from two uncontrolled releases at the MCC property which were draining directly into Vince Bayou; d) toluene was detected at 70 and 258 µg/L in samples collected from two uncontrolled releases at the MCC property which were draining directly into Vince Bayou; e) xylenes were detected at 426 and 4,320 µg/L in samples collected from two uncontrolled releases at the MCC property which were draining directly into Vince Bayou; f) methyl ethyl ketone was detected at 203 and 198 µg/L in samples collected from two uncontrolled releases at the MCC property which were draining directly into Vince Bayou and was also detected at 0.695 mg/L in a sludge sample collected from the north tank farm at the USOR property; g) hydrogen sulfide was detected as high as 1,000 ppm in the liquids recovered from the north tank farm at the USOR property; h) sodium hydroxide was detected in an above-ground poly-tank at the USOR property.

15. During March, 2011, the EPA took further samples of on-Site soil and from sediment at nearby Vince Bayou. The sampling results detected the following additional hazardous substances: arsenic, mercury and silver.

16. The area of Vince Bayou at or near the Site is fished for Red Fish, Trout, Alligator Gar, Bass, and Catfish, and these fish are caught for human consumption. The closest residences are approximately 150 feet south of the MCC property, and there is a community park approximately 650 feet southwest of the facility.

17. The predominant threat to human populations, animals or the food chain is the potential for exposure by direct contact with volatile organic compounds (benzene, hydrogen sulfide), metals (arsenic, mercury, silver), flammables, corrosives, and unknown waste material at the Site and in nearby Vince Bayou and its sediments. The hazardous substances listed above can cause skin irritation, headaches, unconsciousness, coma, effects to the blood and immune system, smell and respiratory irritation, mental confusion and memory loss, dizziness, possible damage to liver and kidneys, and even death for humans.

18. The Site was listed on the National Priorities List (“NPL”) pursuant to CERCLA Section 105, 42 U.S.C. § 9605, on September 18, 2012.

19. On August 25, 2011, a group of potentially responsible parties (“PRPs”) entered into an Administrative Order on Consent (“AOC”) for a Time-Critical Removal Action to take over and perform site stabilization activities at the Site. The site stabilization is currently ongoing pursuant to the August 25, 2011 AOC. The list of Respondents in Appendix A numbered 1 through \_\_\_ sent, transported or arranged to have sent or transported waste material containing hazardous substances found at the Site for disposal or treatment at the Site while it was owned and/or operated by USOR LLC. The list of Respondents in Appendix A numbered \_\_\_ through \_\_\_ previously owned and/or operated one or more of the properties within the Site at the time

hazardous substances were released.

20. On September 14, 2011, the EPA issued a Non-Interference Unilateral Administrative Order ("UAO") to certain parties, including the owner and operator of the Site property, to prevent any of their on-site activities from interfering with the ongoing site-stabilization effort being performed under the August 25, 2011 AOC.

## **VI. CONCLUSIONS OF LAW AND DETERMINATIONS**

Based on the Findings of Fact set forth above, EPA has determined that:

21. The U.S. Oil Recovery Superfund Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

22. The contamination found at the Site, as identified in the Findings of Fact above, includes "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

23. The conditions described in Section V of the Findings of Fact above constitute an actual and/or threatened "release" of a hazardous substance from the facility as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

24. Each Respondent is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

25. Respondents are responsible parties under Sections 104, 107 and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607 and 9622. Each Respondent is a person who either generated the hazardous substances found at the Site, is a person who at the time of disposal of any hazardous substances owned or operated the Site, or is a person who arranged for disposal or transport for disposal of hazardous substances at the Site. Each Respondent therefore may be liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

26. The actions required by this Order are necessary to protect the public health, welfare or the environment, are in the public interest, 42 U.S.C. § 9622(a), are consistent with CERCLA and the NCP, 42 U.S.C. §§ 9604(a)(1), 9622(a), and will expedite effective remedial action and minimize litigation, 42 U.S.C. § 9622(a).

27. EPA has determined that Respondents are qualified to conduct the RI/FS within the meaning of Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), and will carry out the Work properly and promptly, in accordance with Sections 104(a) and 122(a) of CERCLA, 42 U.S.C. §§ 9604(a) and 9622(a), if Respondents comply with the terms of this Order.

## **VII. ORDER**

28. Based upon the foregoing Findings of Fact and Conclusions of Law and Determinations, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Order, including, but not limited to, all appendices to this Order and all documents incorporated by reference into this Order.

## **VIII. DESIGNATION OF CONTRACTORS AND PROJECT COORDINATORS**

29. Selection of Contractors, Personnel. All Work performed under this Order shall be under the direction and supervision of qualified personnel. Within 30 days of the Effective Date of this Order, and before the Work outlined below begins, Respondents shall notify EPA in writing of the names, titles, and qualifications of the personnel, including contractors, subcontractors, consultants and laboratories to be used in carrying out such Work. With respect to any proposed contractor, Respondents shall demonstrate that the proposed contractor has a quality system which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995, or most recent version), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001 or subsequently issued guidance) or equivalent documentation as determined by EPA. The qualifications of the persons undertaking the Work for Respondents shall be subject to EPA's review, for verification that such persons meet minimum technical background and experience requirements. If EPA disapproves in writing of any person's technical qualifications, Respondents shall notify EPA of the identity and qualifications of the replacements within 30 days of the written notice. If EPA subsequently disapproves of the replacement, EPA reserves the right to terminate this Order and to conduct a complete RI/FS, and to seek reimbursement for costs and penalties from Respondents. During the course of the RI/FS, Respondents shall notify EPA in writing of any changes or additions in the personnel used to carry out such Work, providing their names, titles, and qualifications. EPA shall have the same right to disapprove changes and additions to personnel as it has hereunder regarding the initial notification.

30. Within 30 days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents required by this Order and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site Work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number and qualifications within 14 days following EPA's disapproval. Respondents shall have the right to change their Project Coordinator, subject to EPA's right to disapprove. Respondents shall notify EPA seven (7) days before such a change



is made. The initial notification may be made orally, but shall be promptly followed by a written notification. Receipt by Respondents' Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by Respondents.

31. EPA has designated Philip H. Allen, P.E. of the EPA Region 6 Superfund Division as its Remedial Project Manager ("RPM"). EPA will notify Respondents of a change of its designated RPM. Except as otherwise provided in this Order, Respondents shall direct all submissions required by this Order to the RPM at the US EPA Region 6, 6SF-RA, 1445 Ross Ave., Dallas, TX 75202 or by electronic mail if so directed by the RPM.

32. EPA's RPM shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and On-Scene Coordinator ("OSC") by the NCP. In addition, EPA's RPM shall have the authority consistent with the NCP, to halt any Work required by this Order, and to take any necessary response action when s/he determines that conditions at the Site may present an immediate endangerment to public health or welfare or the environment. The absence of the EPA RPM from the area under study pursuant to this Order shall not be cause for the stoppage or delay of Work.

33. EPA shall arrange for a qualified person to assist in its oversight and review of the conduct of the RI/FS, as required by Section 104(a) of CERCLA, 42 U.S.C. Section 9604(a). Such person shall have the authority to observe Work and make inquiries in the absence of EPA, but not to modify the RI/FS Work Plan.

## **IX. WORK TO BE PERFORMED**

34. Respondents shall conduct the RI/FS in accordance with the provisions of this Order, the SOW, CERCLA, the NCP and EPA guidance, including, but not limited to the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (OSWER Directive # 9355.3-01, October 1988 or subsequently issued guidance), "Guidance for Data Useability in Risk Assessment" (OSWER Directive #9285.7-05, October 1990 or subsequently issued guidance), and guidance referenced therein, and guidances referenced in the SOW, as may be amended or modified by EPA. The Remedial Investigation ("RI") shall consist of collecting data to characterize site conditions, determining the nature and extent of the contamination at or from the Site, assessing risk to human health and the environment and conducting treatability testing as necessary to evaluate the potential performance and cost of the treatment technologies that are being considered. The Feasibility Study ("FS") shall determine and evaluate (based on treatability testing, where appropriate) alternatives for remedial action to prevent, mitigate or otherwise respond to or remedy the release or threatened release of hazardous substances, pollutants, or contaminants at or from the Site. The alternatives evaluated must include, but shall not be limited to, the range of alternatives described in the NCP, and shall include remedial actions that utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. In evaluating the alternatives, Respondents shall address the factors required to be taken into account by Section 121 of CERCLA, 42 U.S.C. § 9621, and Section 300.430(e) of the NCP, 40 C.F.R. § 300.430(e).

Upon request by EPA, Respondents shall submit in electronic form all portions of any plan, report or other deliverable Respondents are required to submit pursuant to provisions of this Order.

35. Upon receipt of the draft Feasibility Study (“FS”) report, the EPA will evaluate, as necessary, the estimates of the risk to the public and environment that are expected to remain after a particular remedial alternative has been completed and will evaluate the durability, reliability and effectiveness of any proposed Institutional Controls.

36. Modification of the RI/FS Work Plan.

a. If at any time during the RI/FS process, Respondents identify a need for additional data, Respondents shall submit a memorandum documenting the need for additional data to the EPA RPM within fifteen (15) days of identification. The EPA in its discretion will determine whether the additional data will be collected by Respondents and whether it will be incorporated into plans, reports and other deliverables.

b. In the event of unanticipated or changed circumstances at the Site, Respondents shall notify the EPA RPM by telephone within 24 hours of discovery of the unanticipated or changed circumstances. In the event that the EPA determines that the immediate threat or the unanticipated or changed circumstances warrant changes in the RI/FS Work Plan, the EPA shall modify or amend the RI/FS Work Plan in writing accordingly. Respondents shall perform the RI/FS Work Plan as modified or amended.

c. The EPA may determine that in addition to tasks defined in the initially approved RI/FS Work Plan, other additional Work may be necessary to accomplish the objectives of the RI/FS. Respondents agree to perform these response actions in addition to those required by the initially approved RI/FS Work Plan, including any approved modifications, if the EPA determines that such actions are necessary for a complete RI/FS.

d. Respondents shall confirm their willingness to perform the additional Work in writing to the EPA within 7 days of receipt of the EPA request. If Respondents object to any modification determined by the EPA to be necessary pursuant to this Paragraph, Respondents may seek dispute resolution pursuant to Section XV (Dispute Resolution). The SOW and/or RI/FS Work Plan shall be modified in accordance with the final resolution of the dispute.

e. Respondents shall complete the additional Work according to the standards, specifications, and schedule set forth or approved by the EPA in a written modification to the RI/FS Work Plan or written RI/FS Work Plan supplement. The EPA reserves the right to conduct the Work itself at any point, to seek reimbursement from Respondents, and/or to seek any other appropriate relief.

f. Nothing in this Paragraph shall be construed to limit the EPA’s authority to require performance of further response actions at the Site.

37. Off-Site Shipment of Waste Material. Respondents shall, prior to any off-site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the EPA's Designated Project Coordinator. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

a. Respondents shall include in the written notification the following information: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Respondents shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by Respondents following the award of the contract for the remedial investigation and feasibility study. Respondents shall provide the information required by Subparagraph 37.a and 37.c as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

c. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Respondents shall obtain the EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondents shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

38. Meetings. Respondents shall make presentations at, and participate in, meetings at the request of the EPA during the initiation, conduct, and completion of the RI/FS. In addition to discussion of the technical aspects of the RI/FS, topics will include anticipated problems or new issues. Meetings will be scheduled at the EPA's discretion.

39. Progress Reports. In addition to the plans, reports and other deliverables set forth in this Order, Respondents shall provide to the EPA monthly progress reports by the \_\_\_\_th day of the following month. At a minimum, with respect to the preceding month, these progress reports shall (1) describe the actions which have been taken to comply with this Order during that month, (2) include all results of sampling and tests and all other data received by Respondents, (3) describe Work planned for the next two months with schedules relating such Work to the overall project schedule for RI/FS completion, and (4) describe all problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays.

40. Emergency Response and Notification of Releases.

a. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action. Respondents shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondents shall also immediately notify the EPA Project Coordinator or, the Regional Duty Officer at (866) 372-7745 of the incident or Site conditions. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and the EPA takes such action instead, Respondents shall reimburse the EPA all costs of the response action not inconsistent with the NCP pursuant to Section XVIII (Payment of Response Costs).

b. In addition, in the event of any release of a hazardous substance from the Site, Respondents shall immediately notify the EPA Project Coordinator, the OSC or Regional Duty Officer at (866) 372-7745 and the National Response Center at (800) 424-8802. Respondents shall submit a written report to the EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

**X. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

41. After review of any plan, report or other item that is required to be submitted for approval pursuant to this Order, in a notice to Respondents the EPA will: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Respondents modify the submission; or (e) any combination of the above. However, the EPA shall not modify a submission without first providing Respondents at least one notice of deficiency and an opportunity to cure within fifteen (15) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects.

42. In the event of approval, approval upon conditions, or modification by the EPA, pursuant to Subparagraph 41(a), (b), (c) or (e), Respondents shall proceed to take any action required by the plan, report or other deliverable, as approved or modified by the EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XV (Dispute Resolution) with respect to the modifications or conditions made by the EPA. Following EPA approval or modification of a submission or portion thereof, Respondents shall not thereafter alter or amend such submission or portion thereof unless directed by the EPA. In the event that the EPA modifies the submission to cure the deficiencies pursuant to Subparagraph 41(c) and the

submission had a material defect, the EPA retains the right to seek stipulated penalties, as provided in Section XVI (Stipulated Penalties).

43. Resubmission.

a. Upon receipt of a notice of disapproval, Respondents shall, within fifteen (15) days or such longer time as specified by the EPA in such notice, correct the deficiencies and resubmit the plan, report, or other deliverable for approval. Any stipulated penalties applicable to the submission, as provided in Section XVI, shall accrue during the 15-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 44 and 45.

b. Notwithstanding the receipt of a notice of disapproval, Respondents shall proceed to take any action required by any non-deficient portion of the submission, unless otherwise directed by the EPA. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XVI (Stipulated Penalties).

c. Respondents shall not proceed further with any subsequent activities or tasks until receiving EPA approval, approval on condition or modification of the following deliverables: RI/FS Work Plan and Sampling and Analysis Plan, Draft Remedial Investigation Report and Treatability Testing Work Plan and Sampling and Analysis Plan and Draft Feasibility Study Report. While awaiting EPA approval, approval on condition or modification of these deliverables, Respondents shall proceed with all other tasks and activities which may be conducted independently of these deliverables, in accordance with the schedule set forth under this Order.

d. For all remaining deliverables not listed above in subparagraph 43.c., Respondents shall proceed with all subsequent tasks, activities and deliverables without awaiting EPA approval on the submitted deliverable. The EPA reserves the right to stop Respondents from proceeding further, either temporarily or permanently, on any task, activity or deliverable at any point during the RI/FS.

44. If the EPA disapproves a resubmitted plan, report or other deliverable, or portion thereof, the EPA may again direct Respondents to correct the deficiencies. The EPA shall also retain the right to modify or develop the plan, report or other deliverable. Respondents shall implement any such plan, report, or deliverable as corrected, modified or developed by the EPA, subject only to Respondents' right to invoke the procedures set forth in Section XV (Dispute Resolution).

45. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by the EPA due to a material defect, Respondents shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately unless Respondents invoke the dispute

resolution procedures in accordance with Section XV (Dispute Resolution) and the EPA's action is revoked or substantially modified pursuant to a Dispute Resolution decision issued by the EPA or superceded by an agreement reached pursuant to that Section. The provisions of Section XV (Dispute Resolution) and Section XVI (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If the EPA's disapproval or modification is not otherwise revoked, substantially modified or superceded as a result of a decision or agreement reached pursuant to the Dispute Resolution process set forth in Section XV, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVI.

46. In the event the EPA takes over some of the tasks, but not the preparation of the RI Report or the FS Report, Respondents shall incorporate and integrate information supplied by the EPA into the final reports.

47. All plans, reports, and other deliverables submitted to the EPA under this Order shall, upon approval or modification by the EPA, be incorporated into and enforceable under this Order. In the event the EPA approves or modifies a portion of a plan, report, or other deliverable submitted to the EPA under this Order, the approved or modified portion shall be incorporated into and enforceable under this Order.

48. Neither failure of the EPA to expressly approve or disapprove of Respondents' submissions within a specified time period, nor the absence of comments, shall be construed as approval by the EPA. Whether or not the EPA gives express approval for Respondents' deliverables, Respondents are responsible for preparing deliverables acceptable to the EPA.

## **XI. QUALITY ASSURANCE, SAMPLING, AND ACCESS TO INFORMATION**

49. Quality Assurance. Respondents shall assure that Work performed, samples taken and analyses conducted conform to the requirements of the SOW, the QAPP and guidances identified therein. Respondents will assure that field personnel used by Respondents are properly trained in the use of field equipment and in chain of custody procedures. Respondents shall only use laboratories which have a documented quality system that complies with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA.

### **50. Sampling.**

a. All results of sampling, tests, modeling or other data (including raw data) generated by Respondents, or on Respondents' behalf, during the period that this Order is effective, shall be submitted to the EPA in the next monthly progress report as described in Paragraph 39 of this Order. The EPA will make available to Respondents validated data generated by the EPA unless it is exempt from disclosure by any federal or state law or regulation.

b. Respondents shall verbally notify the EPA at least seven (7) days prior to

conducting significant field events as described in the SOW, RI/FS Work Plan or Sampling and Analysis Plan. At the EPA's verbal or written request, or the request of the EPA's oversight assistant, Respondents shall allow split or duplicate samples to be taken by the EPA (and its authorized representatives) of any samples collected in implementing this Order. All split samples of Respondents shall be analyzed by the methods identified in the QAPP.

51. Access to Information.

a. Respondents shall provide to the EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to the EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

b. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to the EPA under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by the EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when it is submitted to the EPA, or if the EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents. Respondents shall segregate and clearly identify all documents or information submitted under this Order for which Respondents assert business confidentiality claims.

c. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents assert such a privilege in lieu of providing documents, they shall provide the EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

d. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

52. In entering into this Order, Respondents waive any objections to any data gathered, generated, or evaluated by the EPA, the State or Respondents in the performance or oversight of the Work that has been verified according to the quality assurance/quality control (“QA/QC”) procedures required by the Order or any EPA-approved RI/FS Work Plans or Sampling and Analysis Plans. If Respondents object to any other data relating to the RI/FS, Respondents shall submit to the EPA a report that specifically identifies and explains its objections, describes the acceptable uses of the data, if any, and identifies any limitations to the use of the data. The report must be submitted to the EPA within 15 days of the monthly progress report containing the data.

## **XII. SITE ACCESS AND INSTITUTIONAL CONTROLS**

53. If the Site, or any other property where access is needed to implement this Order, is owned or controlled by any of Respondents, such Respondents shall, commencing on the Effective Date, provide the EPA and its representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order.

54. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within 30 days after the Effective Date, or as otherwise specified in writing by the EPA Project Coordinator. Respondents shall immediately notify the EPA if after using their best efforts they are unable to obtain such agreements. For purposes of this Paragraph, “best efforts” includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. If Respondents cannot obtain access agreements, the EPA may either (i) obtain access for Respondents or assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as the EPA deems appropriate; (ii) perform those tasks or activities with EPA contractors; or (iii) terminate the Order. Respondents shall reimburse the EPA for all costs and attorney’s fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XVIII (Payment of Response Costs). If the EPA performs those tasks or activities with EPA contractors and does not terminate the Order, Respondents shall perform all other tasks or activities not requiring access to that property, and shall reimburse the EPA for all costs incurred in performing such tasks or activities. Respondents shall integrate the results of any such tasks or activities undertaken by the EPA into its plans, reports and other deliverables.

55. Notwithstanding any provision of this Order, the EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

## **XIII. COMPLIANCE WITH OTHER LAWS**

56. Respondents shall comply with all applicable local, state and federal laws and regulations when performing the RI/FS. No local, state, or federal permit shall be required for



any portion of any action conducted entirely on-site, including studies, if the action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621. Where any portion of the Work is to be conducted off-site and requires a federal or state permit or approval, Respondents shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals. This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

#### **XIV. RETENTION OF RECORDS**

57. During the pendency of this Order and for a minimum of 10 years after commencement of construction of any remedial action, each Respondent shall preserve and retain all non-identical copies of documents, records, and other information (including documents, records, or other information in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 10 years after commencement of construction of any remedial action, Respondents shall also instruct their contractors and agents to preserve all documents, records, and other information of whatever kind, nature or description relating to performance of the Work.

58. At the conclusion of this document retention period, Respondents shall notify the EPA at least 90 days prior to the destruction of any such documents, records or other information, and, upon request by the EPA, Respondents shall deliver any such documents, records, or other information to the EPA. Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide the EPA with the following: 1) the title of the document, record, or other information; 2) the date of the document, record, or other information; 3) the name and title of the author of the document, record, or other information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or other information; and 6) the privilege asserted by Respondents. However, no documents, records or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

59. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the EPA or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

#### **XV. DISPUTE RESOLUTION**

60. Unless otherwise expressly provided for in this Order, the dispute resolution

procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order. The Parties shall attempt to resolve any disagreements concerning this Order expeditiously and informally.

61. If Respondents object to any EPA action taken pursuant to this Order, including billings for Future Response Costs, they shall notify the EPA in writing of their objection(s) within 30 days of such action, unless the objection(s) has/have been resolved informally. The EPA and Respondents shall have 60 days from the EPA's receipt of Respondents' written objection(s) to resolve the dispute (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of the EPA. Such extension may be granted verbally but must be confirmed in writing.

62. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Order. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Division Director level or higher will issue a written decision. The EPA's decision shall be incorporated into and become an enforceable part of this Order. Respondents' obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with the EPA's decision, whichever occurs, and regardless of whether Respondents agree with the decision.

## **XVI. STIPULATED PENALTIES**

63. Respondents shall be liable to the EPA for stipulated penalties in the amounts set forth in Paragraphs 64 and 65 for failure to comply with any of the requirements of this Order specified below unless excused under Section XVII (Force Majeure). "Compliance" by Respondents shall include completion of the Work under this Order or any activities contemplated under any RI/FS Work Plan or other plan approved under this Order identified below, in accordance with all applicable requirements of law, this Order, the SOW, and any plans or other documents approved by the EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

### **64. Stipulated Penalty Amounts - Work.**

a. The following stipulated penalties shall accrue per day for any noncompliance identified in Subparagraph 64(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1500	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 2000	15 <sup>th</sup> through 30 <sup>th</sup> day

\$ 2500

31<sup>st</sup> day and beyond

b. Compliance Milestones

1. Payment of Future Response Costs
2. Establishment of Escrow Accounts in the event of Disputes
3. Implementation of the Work Plan in accordance with the schedule provided in the plan and in the SOW.
4. Implementation of the Sampling and Analysis Plan in accordance with the schedule provided in the plan and in the SOW.
5. Completion of Site Characterization in accordance with the provisions and schedule in the Work Plan and SOW.

65. Stipulated Penalty Amounts - Reports.

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to Paragraphs 34 through 39:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1500	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 2000	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 2500	31 <sup>st</sup> day and beyond

66. In the event that the EPA assumes performance of a portion or all of the Work pursuant to Paragraph 84 of Section XX (Reservation of Rights by the EPA), Respondents shall be liable for a stipulated penalty in the amount of \$500,000.

67. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section X (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31<sup>st</sup> day after the EPA's receipt of such submission until the date that the EPA notifies Respondents of any deficiency; and (2) with respect to a decision by the EPA Management Official designated in Paragraph 62 of Section XV (Dispute Resolution), during the period, if any, beginning on the 21<sup>st</sup> day after the Negotiation Period begins until the date that the EPA Management Official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

68. Following the EPA's determination that Respondents have failed to comply with a requirement of this Order, the EPA may give Respondents written notification of the same and

describe the noncompliance. The EPA may send Respondents a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether the EPA has notified Respondents of a violation.

69. All penalties accruing under this Section shall be due and payable to the EPA within 30 days of Respondents' receipt from the EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures in accordance with Section XV (Dispute Resolution). All payments to the EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to the U.S. Environmental Protection Agency, Superfund Payments, Cincinnati Finance Center, P.O. Box 979076, St. Louis, MO 63197-9000, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number A6X7, the EPA Docket Number \_\_\_\_\_, and the name and address of the party(ies) making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s) shall be sent to the EPA as provided in Paragraph 31, and to Ms. Cynthia Brown, U.S. EPA Region 6, 6SF-TE, 1445 Ross Avenue, Dallas, TX 75202.

70. The payment of penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this Order.

71. Penalties shall continue to accrue as provided in Paragraph 67 during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of the EPA's decision.

72. If Respondents fail to pay stipulated penalties when due, the EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 69.

73. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of the EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that the EPA shall not seek civil penalties pursuant to Section 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of willful violation of this Order or in the event that the EPA assumes performance of a portion or all of the Work pursuant to Section XX (Reservation of Rights by the EPA), Paragraph 84. Notwithstanding any other provision of this Section, the EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

## **XVII. FORCE MAJEURE**

74. Respondents agree to perform all requirements of this Order within the time limits

established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, *force majeure* is defined as any event arising from causes beyond the control of Respondents or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondents' best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

75. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondents shall notify the EPA orally within 48 hours of when Respondents first knew that the event might cause a delay. Within 14 days thereafter, Respondents shall provide to the EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

76. If the EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by the EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If the EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, the EPA will notify Respondents in writing of its decision. If the EPA agrees that the delay is attributable to a *force majeure* event, the EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

## **XVIII. PAYMENT OF RESPONSE COSTS**

77. Payment for Past Response Costs. Although payment for past response costs are not sought in this Settlement Agreement the EPA hereby reserves its right to seek past response costs in any subsequent administrative and/or judicial settlement agreement or action.

78. Payments of Future Response Costs.

a. Respondents shall pay the EPA all Future Response Costs not inconsistent with the NCP. On an annual basis, the EPA will send Respondents a bill requiring payment that includes a Standard Cost Accounting Report (SCORPIOS report) which includes direct and indirect costs incurred by the EPA and its contractors. Respondents shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in

Paragraph 79 of this Order. Respondents shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party(ies) making payment and EPA Site/Spill ID number A6X7. Respondents shall send the check(s) to:

EPA Superfund U.S. Oil Recovery Superfund Site (A6X7)  
U.S. Environmental Protection Agency  
Superfund Payments  
Cincinnati Finance Center  
P.O. Box 979076  
St. Louis, MO 63197-9000

b. At the time of payment, Respondents shall send notice that payment has been made to the e-mail address at [acctsreceivable.cinwd@epa.gov](mailto:acctsreceivable.cinwd@epa.gov), and to:

EPA Cincinnati Finance Office  
26 Martin Luther King Drive  
Cincinnati, OH 45268

c. The total amount to be paid by Respondents pursuant to Subparagraph 78.a. shall be deposited in the U.S. Oil Recovery and MCC Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by the EPA to the EPA Hazardous Substance Superfund.

79. If Respondents do not pay Future Response Costs within 30 days of Respondents' receipt of a bill, Respondents shall pay Interest on the unpaid balance of Future Response Costs, respectively. The Interest on unpaid Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. If the EPA receives a partial payment, Interest shall accrue on any unpaid balance. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to, payments of stipulated penalties pursuant to Section XVI. Respondents shall make all payments required by this Paragraph in the manner described in Paragraph 78.

80. Respondents may contest payment of any Future Response Costs under Paragraph 78 if they determine that the EPA has made an accounting error or if they believe the EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the EPA Project Coordinator. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondents shall within the 30 day period pay all uncontested Future Response Costs to the EPA in the manner described in Paragraph 78. Simultaneously, Respondents shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Texas and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs.

Respondents shall send to the EPA Project Coordinator a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondents shall initiate the Dispute Resolution procedures in Section XV (Dispute Resolution). If the EPA prevails in the dispute, within 5 days of the resolution of the dispute, Respondents shall pay the sums due (with accrued interest) to the EPA in the manner described in Paragraph 78. If Respondents prevail concerning any aspect of the contested costs, Respondents shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the EPA in the manner described in Paragraph 78. Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondents' obligation to reimburse the EPA for its Future Response Costs.

### **XIX. COVENANT NOT TO SUE BY EPA**

81. In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Order, and except as otherwise specifically provided in this Order, the EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work performed under this Order and for recovery of Future Response Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondents of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XVIII. This covenant not to sue extends only to Respondents and does not extend to any other person.

### **XX. RESERVATIONS OF RIGHTS BY EPA**

82. Except as specifically provided in this Order, nothing herein shall limit the power and authority of the EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent the EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

83. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. The EPA reserves, and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondents to meet a requirement of this Order;

- b. liability for costs not included within the definition of Future Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

84. Work Takeover. In the event the EPA determines that Respondents have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, the EPA may assume the performance of all or any portion of the Work as the EPA determines necessary. Respondents may invoke the procedures set forth in Section XV (Dispute Resolution) to dispute the EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the EPA in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondents shall pay pursuant to Section XVIII (Payment of Response Costs). Notwithstanding any other provision of this Order, the EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

## **XXI. COVENANT NOT TO SUE BY RESPONDENTS**

85. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Future Response Costs, or this Order, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claim arising out of the Work or arising out of the response actions for which the Future Response Costs have or will be incurred, including any claim under the United States Constitution, the Texas Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work or payment of Future Response



Costs.

86. These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 83 (b), (c), and (e) - (g), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

87. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

## **XXII. OTHER CLAIMS**

88. By issuance of this Order, the United States and the EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents.

89. Except as expressly provided in Section XIX (Covenant Not to Sue by EPA), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

90. No action or decision by the EPA pursuant to this Order shall give rise to any right to judicial review except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

## **XXIII. CONTRIBUTION PROTECTION**

91. The Parties agree that Respondents are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Order. The "matters addressed" in this Order are the Work, and Future Response Costs. Nothing in this Order precludes the United States or Respondents from asserting any claims, causes of action, or demands against any person not parties to this Order for indemnification, contribution, or cost recovery.

## **XXIV. INDEMNIFICATION**

92. Respondents shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondents agree to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the

United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Order. Neither Respondents nor any such contractor shall be considered an agent of the United States.

93. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.

94. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Site. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Site.

## **XXV. INSURANCE**

95. At least 30 days prior to commencing any On-Site Work under this Order, Respondents shall secure, and shall maintain for the duration of this Order, comprehensive general liability insurance and automobile insurance with limits of \$5,000,000 dollars, combined single limit, naming the EPA as an additional insured. Within the same period, Respondents shall provide the EPA with certificates of such insurance and a copy of each insurance policy. Respondents shall submit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Order, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Order. If Respondents demonstrate by evidence satisfactory to the EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondents need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

## **XXVI. FINANCIAL ASSURANCE**

96. Within 30 days of the Effective Date, Respondents shall establish and maintain financial security for the benefit of the EPA in the amount of \$ **[insert estimated cost of Work]** in one or more of the following forms, in order to secure the full and final completion of Work by Respondents:

- a. a surety bond unconditionally guaranteeing payment and/or performance of the

Work;

b. one or more irrevocable letters of credit, payable to or at the direction of EPA, issued by financial institution(s) acceptable in all respects to the EPA equaling the total estimated cost of the Work;

c. a trust fund administered by a trustee acceptable in all respects to the EPA;

d. a policy of insurance issued by an insurance carrier acceptable in all respects to EPA, which ensures the payment and/or performance of the Work;

e. a corporate guarantee to perform the Work provided by one or more parent corporations or subsidiaries of Respondents, or by one or more unrelated corporations that have a substantial business relationship with at least one of Respondents; including a demonstration that any such company satisfies the financial test requirements of 40 C.F.R. Part 264.143(f); and/or

f. a corporate guarantee to perform the Work by one or more of Respondents, including a demonstration that any such Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f).

97. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to the EPA, determined in the EPA's sole discretion. In the event that the EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondents shall, within 30 days of receipt of notice of the EPA's determination, obtain and present to the EPA for approval one of the other forms of financial assurance listed in Paragraph 96, above. In addition, if at any time the EPA notifies Respondents that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondents shall obtain and present to the EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondents' inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Order.

98. If Respondents seek to ensure completion of the Work through a guarantee pursuant to Subparagraph 96.e. or 96.f. of this Order, Respondents shall (i) demonstrate to EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date, to the EPA. For the purposes of this Order, wherever 40 C.F.R. Part 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the current cost estimate of \$\_\_\_ for the Work at the Site shall be used in relevant financial test calculations.

99. If, after the Effective Date, Respondents can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 96 of this Section, Respondents may, on any anniversary date of the Effective Date, or at any other time agreed to

by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondents shall submit a proposal for such reduction to the EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from the EPA. In the event of a dispute, Respondents may seek dispute resolution pursuant to Section XV (Dispute Resolution). Respondents may reduce the amount of security in accordance with the EPA's written decision resolving the dispute.

100. Respondents may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by the EPA, provided that the EPA determines that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondents may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

## **XXVII. INTEGRATION/APPENDICES**

101. This Order and its appendices and any deliverables, technical memoranda, specifications, schedules, documents, plans, reports (other than progress reports), etc. that will be developed pursuant to this Order and become incorporated into and enforceable under this Order constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order. The following appendices are attached to and incorporated into this Order:

“Appendix A” is the list of Respondents.

“Appendix B is the SOW map of the Site.

“Appendix C” is the map of the Site.

## **XXVIII. ADMINISTRATIVE RECORD**

102. The EPA will determine the contents of the administrative record file for selection of the remedial action. Respondents shall submit to the EPA documents developed during the course of the RI/FS upon which selection of the response action may be based. Upon request of the EPA, Respondents shall provide copies of plans, task memoranda for further action, quality assurance memoranda and audits, raw data, field notes, laboratory analytical reports and other reports. Upon request of the EPA, Respondents shall additionally submit any previous studies conducted under state, local or other federal authorities relating to selection of the response action, and all communications between Respondents and state, local or other federal authorities concerning selection of the response action. At the EPA's discretion, Respondents shall establish a community information repository at or near the Site, to house one copy of the administrative record.

## **XXIX. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION**

103. This Order shall be effective on the day the Order is signed by the Superfund Division Director.

104. This Order may be amended by mutual agreement of the EPA and Respondents. Amendments shall be in writing and shall be effective when signed by the EPA. EPA Project Coordinators do not have the authority to sign amendments to the Order.

105. No informal advice, guidance, suggestion, or comment by the EPA Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

## **XXX. NOTICE OF COMPLETION OF WORK**

106. When the EPA determines that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including but not limited to payment of Future Response Costs or record retention, the EPA will provide written notice to Respondents. If the EPA determines that any such Work has not been completed in accordance with this Order, the EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the RI/FS Work Plan if appropriate in order to correct such deficiencies, in accordance with Paragraph 36 (Modification of the Work Plan). Failure by Respondents to implement the approved modified RI/FS Work Plan shall be a violation of this Order.

Agreed this \_\_\_\_ day of \_\_\_\_\_, 2013.

For Respondent \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

It is so ORDERED AND AGREED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

BY: \_\_\_\_\_ DATE: \_\_\_\_\_

Director, Superfund Division  
Region 6  
U.S. Environmental Protection Agency  
EFFECTIVE DATE: \_\_\_\_\_